

# Charles W. Malphurs v. U.S. General Accounting Office

**Docket No. 119-211-17-89**

**Date of Decision: February 13, 1990**

**Cite as: Malphurs v. GAO (2/13/90)**

**Before: Jessie James, Jr., Chair**

## **Summary Judgment**

## **Material Facts**

## **DECISION ON MOTION FOR SUMMARY JUDGMENT**

## **INTRODUCTION**

This matter is before me pursuant to a Petition for Review filed by the PAB General Counsel in August of 1989 on behalf of the Petitioner challenging the validity of a performance appraisal received by the Petitioner in June 1989. Petitioner is a GS-13 Evaluator in Respondent's National Security and International Affairs Division. The Petition for Review alleges that Petitioner's performance appraisal is improper because it was not given in compliance with the standards set forth in 5 U.S.C. Section 4302 and GAO Order 2430.1 on performance appraisal, and provisions in the Performance Appraisal Manual for Evaluator and Evaluator-related Positions (the "BARS Manual"). As a result of the alleged noncompliance, Petitioner alleges that the performance appraisal constitutes a prohibited personnel practice in violation of 5 U.S.C. Section 2302 (b)(11). As relief, Petitioner requests that the performance appraisal be destroyed. Respondent replied to the Petition for Review, and in its response, demurred to Petitioner's allegations, while arguing as an affirmative defense that the GAO documents which Petitioner construes as rules and regulations are not rules and regulations, and in any case, were not violated by Respondent. Respondent further argues that Petitioner has failed to make out a statutory case of prohibited personnel practice.

## Factual Arguments

Shortly after discovery was commenced, Petitioner filed a motion for summary judgment, which is the subject of this decision. Petitioner raises four primary grounds upon which he believes summary judgment should be granted. The first relates to how the statutory reference to performance standards contained in 5 U.S.C. Sec. 4302 has been implemented at GAO. That is, under the applicable GAO procedures, what are performance standards. The second is whether the requirement of Section 4302 for communicating performance standards at the beginning of the appraisal period was violated by Petitioner's supervisor. The third is whether the provisions of GAO Order 2430.1 and the BARS Manual cited by Petitioner constitute a rule or regulation. The fourth is whether Petitioner's supervisor violated any of the pertinent provisions of the BARS Manual or GAO Order 2430.1.

Petitioner contends that he is entitled to summary judgment as a matter of law because the following facts are alleged to be undisputed: (1) It is a prohibited personnel practice for a Federal employee to execute a performance appraisal in violation of a law, rule, or regulation that implements or directly concerns a

merit system principle; (2) Section 4302 of Title 5, United States Code directly concerns merit system principles, and it requires each Federal agency to communicate to each employee, at the beginning of each appraisal period and in writing, the performance standards and critical elements of the employee's position; (3) there are two rules or regulations involved in this case: GAO Order 2430.1 and the BARS Manual; (4) GAO Order 2430.1 and the BARS Manual contain mandatory requirements that constitute enforceable rules or regulations which GAO must follow; (5) GAO Order 2430.1 and the BARS Manual implement or directly concern specific merit system principles (5 U.S.C. Secs. 2301(b)(3) and (6)); (6) 5 U.S.C. Sec. 4302 is made applicable to GAO by 32 U.S.C. Sec. 732(d)(1); (7) violation of 5 U.S.C. Section 4302 by any GAO employee would constitute a prohibited personnel practice in violation of 5 U.S.C. Sec. 2302(b)(11); (8) the GAO Personnel Act requires GAO to develop performance appraisal systems which establish and communicate performance standards; (9) GAO Order 2430.1 implements the mandate of the GAO Personnel Act, and requires performance standards to be established, written, and communicated to each employee at the beginning of each rating period; (10) the performance appraisal document which applies to Petitioner's position is the BARS Manual, which implements GAO Order 2430.1, which implements 5 U.S.C. Section 4302; and (11) the BARS Manual requires that expectations for an employee's performance be set at the beginning of the rating period so that a clear understanding can be reached about what performance will be expected during the rating period.

Petitioner also argues that the facts on the record are undisputed that the Petitioner's supervisor did not conduct an expectation setting session for Petitioner during any part of the appraisal period in question, and that this fact was highlighted by the grievance examiner for Petitioner's internal grievance of the performance appraisal. Petitioner alleges that the Agency supervisor who reviewed the grievance examiner's report accepted the grievance examiner's finding that expectations were not set for Petitioner, but held that the error was harmless because Petitioner should have known what was expected of him on the assignment in question. The reviewing official ruled that Petitioner's years of experience as an Evaluator and his previous history of being appraised under the BARS Manual made Petitioner sufficiently knowledgeable about the standards by which his work was to be judged to make his supervisor's failure to formally set expectations excusable.

Petitioner cites Board precedent for his argument that GAO Order 2430.1 is a rule or regulation. Outerbridge v. GAO, 1 PAB 200 (1984). Petitioner also relies on Outerbridge for his assertion that a performance appraisal is a personnel action for purposes of defining a prohibited personnel practice; that GAO Order 2430.1 implements or directly concerns the merit systems principles set forth at 5 U.S.C. Section 2301(b); that a performance appraisal that is executed in violation of the GAO Performance Appraisal Order would constitute a prohibited personnel practice; and that a violation of the Performance Appraisal Order would constitute a prohibited personnel practice. Petitioner reads GAO Order 2430.1 and 5 U.S.C. Section 4302 together to conclude that the statutory requirement that performance standards be communicated to an employee mandates that performance standards be discussed with the employee in a manner that both the supervisor and employee understand the specific standards by which the employee's performance will be appraised. Petitioner contends that, since it is admitted in this case by GAO that no standards were communicated to the employee by the rating official, summary judgment is appropriate on the basis of that evidence alone. Petitioner relies on Jimenez v. GAO, 1 PAB 563 (1988), for the proposition that the BARS Manual is a rule or regulation, and that its provisions with respect to the setting of expectations are mandatory. In Jimenez, a series of unacceptable performance appraisals were voided because the employee's supervisor failed to comply with the requirements of the GAO performance appraisal system by not setting expectations in accordance with the BARS Manual, a right the Presiding Member in Jimenez termed a substantive right.

Respondent opposes Petitioner's contentions on the basis of several arguments, some of which are grounded on a number of allegations of material fact. Respondent's first argument is that the BARS Manual is not a rule or regulation that directly concerns or implements a merit system principle. Instead, Respondent argues that the BARS Manual is a procedural manual which defines the performance standards and critical elements generally applicable to employees who are rated under the BARS system, and provides guidance to agency supervisors and employees with respect to the performance appraisal process and the evaluation of performance. Respondent also argues that, regardless of the legal weight given to the BARS Manual, the spirit of the Manual was complied with, in that Petitioner was sufficiently familiar with his position, and had sufficient experience in being rated under the BARS system, that he knew and understood his assignment, its specific tasks, and the standards under which his performance would be appraised. Moreover, Respondent asserts, Petitioner's supervisor held many meetings with Petitioner to discuss the tasks assigned to Petitioner, both to set expectations for Petitioner and to review Petitioner's progress on the assignments.

Respondent's third contention is that the provisions of the BARS Manual are not mandatory, but are permissive, and do not require a preordained approach to setting performance standards. Rather, the BARS Manual and established case law only require that the Agency make an employee reasonably aware of his performance obligations prior to the onset of the specific assignment. Respondent contends that the manner in which the supervisor communicates performance standards to the employee is at the discretion of the supervisor, and under no circumstances did GAO intend to restrict supervisors to any one method of informing employees of expectations for and evaluation of their performance. In making this argument, Respondent distinguishes the PAB precedent relied upon by Petitioner. Respondent argues that Outerbridge does not concern the BARS Manual, but deals only with GAO Order 2430.1, which Respondent denies incorporates the BARS Manual by reference. Respondent distinguishes Jimenez as holding only that the failure to follow the provisions of the BARS Manual deprived Jimenez of a substantive right because he was under an opportunity period after the Agency had found his performance to be unacceptable.

## ANALYSIS

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is proper where the evidence on record reveals no issues of material fact and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). Where a party fails to establish the existence of material facts essential to a party's case and upon which that party will bear the burden of proof at trial, summary judgment is mandatory. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). At the summary judgment stage, the moving party bears the burden of proving the absence of any material fact. Adickes v. S.H. Kress and Co., 398 U.S. 144, 157 (1970). In deciding if there are any issues of material fact, the nonmoving party's version of the facts must be accepted, since the trier of fact is required to resolve all issues of fact in favor of the party opposing the motion for summary judgment. Bishop v. Wood, 426 U.S. 341 (1976). If there are material facts on the record which lead to the belief that inferences adverse to those of the party seeking summary judgment might be permissible, then the motion for summary judgment must be denied. United States v. Diebold, 369 U.S. 654, 655 (1962). Thus, the party seeking summary judgment must not only make factual allegations which, standing alone, would permit judgment in his favor, but must present undisputed evidence in support of those allegations to prove that judgment in his favor is warranted. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986) (citations omitted).

In this case, there are several critical issues which must be resolved, all of which involve issues of material fact. To begin with, there is a dispute as to whether or not GAO Order 2430.1 and the BARS Manual are rules and regulations, and if so, do they implement or directly concern merit system principles. Additionally, it must be decided if the provisions of the BARS Manual and the GAO Order are mandatory, and must be followed in the same manner as a chef would follow a recipe in baking a fine bread, as the Petitioner urges, or are they merely procedural guides, to be used at the discretion of the supervisor, as the Respondent contends. These are issues that go to the very heart of this controversy. However, regardless of the decision as to the legal status of the GAO Order 2430.1 and the BARS Manual, and whether the provisions of these two documents with respect to communication of performance standards are mandatory or discretionary, there is still the linchpin issue of whether any standards were communicated to Petitioner at all. Was the communication to Petitioner sufficient to put Petitioner on notice as to what was expected of him, and whether that communication was in compliance with 5 U.S.C. Section 4302? Finally, it must be decided if the Petitioner knew or reasonably should have known, what the critical elements and performance standards of his position were. Again, these are determinations that can only be made based on the evidence adduced at a hearing on the merits, and the latter determination may have to be made after hearing testimony and making credibility determinations. It is well-settled that, where motive and intent are factors, summary judgment is particularly inappropriate. Stepanischen v. Merchants Dispatch Transport Co., 722 F.2d 922 (1st Cir. 1983); Peckarsky v. American Broadcasting Co., Inc., 603 F. Supp. 688, 692 (D.D.C. 1984). Clearly, there are important issues of material fact present, issues that can only be settled after a hearing on the merits. Accordingly, Petitioner's motion for summary judgment must be denied.

## **CONCLUSION**

For the above reasons, Petitioner's motion for summary judgment is hereby DENIED.